

**KAMPALA INTERNATIONAL UNIVERSITY**

**A RESEARCH PAPER ON THE TOPIC: WOMEN AND PROPERTY RIGHTS  
IN UGANDA POST 1995**

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## TABLE OF CONTENTS

Dedication .....	iv
Acknowledgement .....	v
Declaration .....	vi
List of statutes .....	vii
List of cases .....	viii
Acronyms .....	ix
1 General Introduction .....	x
1.1 Background .....	x
1.2 Statement of the problem .....	xii
1.3 Objectives of the study .....	xii
1.4 Scope of the research .....	xiii
1.5 Hypothesis .....	xiii
1.6 Significance of the study .....	xiii
1.7 Methodology .....	xiv
1.8 Literature review .....	xiv
1.9 Chapterisation .....	xvii

### CHAPTER ONE

International Instruments Relating to Women Rights .....	1
1. Introduction .....	1
1.1 International Covenant on Civil and Political Rights .....	9
1.2 The International Covenant on Elimination on all Forms of Racial Discrimination .....	9
1.3 The International Covenant on Economic, Social and Cultural Rights...	10
1.4 The African Charter on Human and People's Rights .....	11

### CHAPTER TWO

Municipal Laws and Customary Law Relating to Women's Property Rights....	13
2 Introduction .....	13

2.1 Evolvment of Current Municipal Laws .....	13
2. 2 The Succession Act Chapter 162, Laws of Uganda .....	26
2.3 The Land Act Cap 227, Laws of Uganda .....	26
2.4 The Divorce Act Chapter 249, Laws of Uganda .....	27
2.5 The Administrative General's Act Chapter 157, Laws of Uganda .....	27
2.6 Customary Law Act Cap 248, Laws of Uganda .....	28

### **CHAPTER THREE**

3. Applicability of the Law .....	29
3.1 Introduction .....	29
3.2 Inheritance or Succession Law .....	29
3.2.1 Intestate Succession .....	34
3.2.2 Testate Succession .....	34
3.3 Divorce Law .....	35
3.4 Land Law .....	38

### **CHAPTER FOUR**

4. Gaps, Loopholes and Overlaps .....	44
4.1 Introduction .....	44
4.2 Loopholes in the Law .....	44

### **CHAPTER FIVE**

5. Recommendations and Conclusions .....	48
5.1 Recommendations .....	48
5.2 Conclusion .....	48
Bibliography .....	51

## DEDICATION

This research is dedicated to John Maina and Lucy W. Maina for all their sacrifices towards my education and their faith in me.

I also dedicate it to all fellow students who are struggling with the wrongs they did not do and to all those who are discriminated because of where they come from, color or their skin and the tribe in which they belong.

## ACKNOWLEDGEMENT

First and foremost, I am grateful to the almighty God from whom all blessings flow who has enabled me to complete my Bachelors degree may glory and honor always be given to his name.

I am most grateful to my lecturer, Ms Sophia Nassali who has been my supervisor, I could not have asked for a better supervisor.

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Lastly but not least, I thank my entire family, all my brothers, sisters and my niece Cynthia Wanjiru, for giving all that I ever needed in life through my education may almighty God reward your sacrifices.

## DECLARATION

I (Mathai Sammy Maina) do hereby declare that the work presented here in this dissertation is my own, except where acknowledged, and it has never been submitted or examined in any University as an academic requirement for any award.

Signed

Date 15<sup>th</sup> July 2009

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Ms. Sophia Nassali

Supervisor

Date 15<sup>th</sup> July 2009

## **LIST OF STATUTES**

### **International Instruments**

The Universal Declaration of Human Rights (U.D.H.R)

The International Covenant on Civil and Political Rights (I.C.C.P.R)

The International Covenant on Economic, Social and Cultural Rights (I.C.E.S.C)

The International Covenant on Elimination of all Forms of Racial Discrimination.

The African Charter on Human and Peoples' Rights

### **Uganda Legislation**

The Constitution of the Republic of Uganda, 1995.

The Land Act, CAP 227.

The Administrator General's Act, CAP 157.

The Divorce Act, CAP 249.

The Customary Act, CAP 248.

The Succession Act, CAP 162.

## LIST OF CASES

*Edita Nakiyingi v Merekizedeki* (1973) HCB 23.

*Gakwavu v Gasengaire* (1997) HCB 322.

In The Matter of the Estate of *Sulaiman* 1991 (Unreported),

*M v M* High court Divorce Cause No 3 of 1998 (Unreported),

*Nyendooha v Nyendooha* (1977) HCB 288.



## ACRONYMS

<b>UWONET</b>	Republic of Ugandan Women's' Network
<b>ULA</b>	Uganda Land Alliance
<b>FIDA</b>	The Uganda Association of Women Lawyers
<b>FOWODE</b>	The Uganda Forum for Women Democracy
<b>DRB</b>	Domestic Relations Bill
<b>IIED</b>	International Institute for Environment and Development

## **INTRODUCTION**

### **1. GENERAL INTRODUCTION**

The year 1998 marked the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights and the 5<sup>th</sup> anniversary of the World Conference on Human Rights in Vienna at which women and girl's human rights were declared part of the universal rights

All forms of violation of the rights of women and all forms of harassment and exploitation of such were declared incompatible with human dignity and their elimination was demanded.

This study was being carried out with the hope that it will enlighten and advance the understanding of women's property rights in Uganda as provided for in the laws. The study was a result of observation of the apparent injustice against women in particular the denial of women to own property emerging as a result of exploitation of the loopholes in the statutory laws in place that provide for the right of ownership of property by women in Uganda as well as customary law that is so prevalent among Ugandans today.

The study emphasizes the need for women to have full rights to property which signifies things having monetary value, especially with reference to transfer or succession of property and things such as land, chattels, money, animals, goods, stock, shares, securities, debt among others.

#### **1.1 BACKGROUND**

The written law in Uganda came into force with the adoption of colonialism. Before that, cultural practices and customs prevailed whereby each society embarked on its own cultural practice. Thus with colonialism in place, laws applicable in England became applicable in Uganda by virtue of the order in council.<sup>1</sup>

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<sup>1</sup> 1902 East African Order in Councils.

However, it was also noted that with respect to the law concerning women's rights to property, the 1882 Married Women's Act of England became applicable in Uganda by precedent thus the East African case of *IVI*,<sup>2</sup> stated inter-alia that the married women's property Act was a statute of general application and therefore applicable in Uganda.

It is also important to note that discriminatory tendencies in the laws started way back during the colonial period where for instance the married women's property Act was only applicable to non-Africans. This was premised on the reasoning that customary law already applied to the Africans. It was until the advent of independence that this Act became part of the laws of Uganda.

Customary laws remained valid subject to the repugnancy test.<sup>3</sup> Various laws came into place that allowed women to own property. These include the 1967 Constitution, the Succession Act Cap 139, Laws of Uganda, the Divorce Act among these. It is important to note that the legal regime embraced different changes after promulgation of the 1995 Constitution of the Republic of Uganda. The current Constitution unlike the previous ones, 1962 and 1967 specifically stated that every Ugandan has a right to own property.<sup>4</sup>

Having noted that the Constitution is the supreme law of the land, other laws existing in Uganda have to conform to the constitutional provisions.<sup>5</sup> Thus, it is along this argument of conformity with the constitution that there was need for research to show whether all the laws providing for ownership of property are not discriminatory against women are equitably applied.

Although the Constitution of Uganda provides for women's equality with men and the rights to private ownership to property, the majority of women in Uganda do not enjoy these rights. The cases or reasons leading to the failure of women to enjoy property ownership rights is therefore worth research as the law stands now, the law of inheritance

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<sup>2</sup> (1971) EA 237

<sup>3</sup> Section 8 Judicature Act 1967

<sup>4</sup> Article 26 of the 1995 Constitution

<sup>5</sup> Article 2 of the Constitution

among other laws needs to be carefully distributed between dependents left behind regardless of sex. Therefore a critical analysis of this particular law had to be done in order to identify women's problems in respect of both statutory and customary laws on inheritance.

Further Uganda being an ex colony of Britain runs dual legal system with statutory laws found on the English common law and customary laws, with this dual system of laws in place, the need for harmonizing statutory laws and customary arises so that property rights under both laws are observed. This research therefore is to be used as tool in harmonizing these laws to enable women enjoy the rights to property provided for in the law.

## **1.2 STATEMENT OF THE PROBLEM**

The 1995 Constitution of the Republic of Uganda and other International Conventions to which Uganda ratified give protection to women among other persons against abuse of their rights, enforcement of these statutory provisions is difficult as they conflict with the culture and traditions deeply rooted in the Ugandan societies. Among which is the common cultural practice that property is owned by the patriarchs in society.

The study was being carried out with the hope that it will enlighten and advance the understanding of women's property rights in Uganda as provided for in the laws. The study is was as a result of observation of the apparent injustice against women in particular the denial of women to own property emerging as a result of exploitation of the loopholes in the statutory laws in place, that provide for the right of ownership of property by women in Uganda as well as customary law that is so prevalent among Ugandans today.

## **1.3 OBJECTIVE OF THE STUDY**

1. To examine women's property rights in Uganda post 1995 Constitution of the Republic of Uganda; the subsidiary laws and customary practices.

2. To identify the obstacles that women face under the right to own property as provided for under the Constitution, subsidiary law(s) and to suggest possible solutions to such obstacles.
3. To formulate strategies aimed at deepening the women understanding of the legal, cultural and economic consequences of their oppression as regards their rights to property ownership.
4. To identify and recommend for the abolition of customs, cultural and statutory laws that discriminate against women concerning property rights.

#### **1.4 SCOPE OF THE RESEARCH**

The laws on property rights of women are rather broad. The study will include the laws that govern matrimonial property, during the substance of such marriage at its dissolution, and also under the law of succession. Further any other law as long as it provides for rights of women to property was considered.

Many writers have intensively researched about women's rights to property in general. The various researches done however do not analyze the legal regime concerning the matter at hand, therefore it has been found necessary that a study be carried out on the analysis of the law concerning rights of women to property as a result of this analysis of the law, it is hoped that some areas of statutory laws and customary practices will be reformed.

#### **1.5 HYPOTHESIS**

The aim of the study was to find out whether, customs and traditions in the Uganda society have an effect on the dignity, welfare and interest of women in regard to ownership of property vis-à-vis right to ownership of property.

#### **1.6 SIGNIFICANCE OF THE STUDY**

The study was addressed to all Ugandans especially to the legislators and policy makers. To ensure that women enjoy right to property, concerted efforts need to be made by all societal institutions to save the women from the violation of this right.

Women have to be considered putting in mind the underlying cultural elements that act as the root causes of the violation of these rights and the possible way to deal with such cultures and hence the right to property by women should therefore be respected and upheld by every Ugandan.

## **1.7 METHODOLOGY**

This research was qualitative and heavily dependant on prior published documents, basically it include library work, by looking at working papers presented both published and unpublished and giving a critical analysis of the same. Having a critical analysis of the law providing for property rights of women in Uganda. Collection of material from magazines, text books and other publications and the analysis of such material and giving of own opinion about the law regarding the rights of women in Uganda.

## **1.8 LITERATURE REVIEW**

The Kalema Commission Report<sup>6</sup> was perhaps the earliest attempt in Uganda to examine the situation of women as far as inheritance marriage and poverty rights on women is concerned. However, the commission was more concerned with inheritance under customary practices other than examining the law on general property rights of women in Uganda.

It was therefore important for me that a research be carried out on the law according to women rights to property. Further, the Kalema commission just dealt with rights of widows under inheritance law not addressing women's rights to property as a whole including the on married women and girls.

In a research paper entitled "*Land Law and Women's Property Rights in Land in Uganda*,"<sup>7</sup> the researcher denotes one chapter on women's land rights and the law of succession and examines women's customary land rights in six different districts and then comes out with general findings that the injustices related to land ownership is

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<sup>6</sup> The Kalema Commission Report on Marriages Divorce and Status of Women, 1964.

<sup>7</sup> Naiga Ayebazibwe , a Thesis 1999 Makerere University, 1999.

associated with an fair system of inheritance the researcher here did not make a concrete analysis of the complex issues of women's inheritance law under the customary law of Uganda. This thesis talks of only widows including daughters and other female beneficiaries.

In another research paper entitled "*The Succession Law and Status of Women in Uganda*,"<sup>8</sup> the author examines the succession of women in nine different districts with special emphasis on land succession. Although this thesis lays a special emphasis on land which is real property, and the thesis is very helpful to this particular research paper. It does not cover other property. The same report lacks a critical analysis of the succession law. For instance it is based on a library research method other than obtaining views of the people from the grass root through interviews.

In an unpublished seminar paper characterized, "*The Rights of Widows under the Law of Inheritance*,"<sup>9</sup> the presenter examines the law of inheritance. Apart from emphasizing the 1972 Succession Act as amended by the Decree, as having improved the position of women in inheritance cases, he also expresses fear that the decree came at an earlier time when the people of Uganda would not comply with due to customary inheritance practices that had gone deep in our society. This paper views the succession law other than the general property rights of women. Again this is not written as a result of a critical study of this particular law regarding inheritance. It is therefore rather to general in its conclusion and needs a critical analysis.

In paper entitled "*Women's Property Rights in Dissolution of a Marriage*,"<sup>10</sup> the paper covers the right of a woman to property in cases of divorce and widowhood. The paper makes a critical analysis of the laws that affects the rights of women in their status as divorced or widowed; social factors that infringe the right of women to property like customary practices and statutory laws have been cited. she also addresses herself to the social economic position of Uganda women and summarizes that the fundamental

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<sup>8</sup> Namutebi Mariam, a Thesis 1999 Makerere University, 1999.

<sup>9</sup> Tibaruha Lucein, Rights of Widows under Inheritance Law, a paper presented 1987 (unpublished).

<sup>10</sup> Okumu - Wengi Jennifer a working paper presented 1990.

problems faced by Uganda women is that after the introduction of a colonial cash economy, men dominated the economy and got an advantage of education which was customary given to boys and not girls. She also addresses herself to the position of property ownership under various customary practices and concluded that women in Uganda do not own land under customary law, and even other chattels they own are under the direct control of their husbands. The paper doesn't exhaust property rights of women under circumstances like before marriage, in marriage and therefore a need for research to cover these areas.

In another thesis entitled "*Property Rights of Women in Islamic Law*",<sup>11</sup> the paper focuses on the theoretical position of Muslim women's right as promulgated by the Koran. Though the researchers says in reality the Muslim community follows their customary practices which discriminates against women; he attempts to make comparative analysis between the succession law under the Koran and the common law inheritance law and concludes that the latter is better since the Islamic law discriminates against women. The paper above in view covers a limited area of the law thus the Koran, the paper also views property rights a religious perspective and more especially on succession law other than property rights of women in general including the un married and other female persons.

The book titled "*The Law of Succession in Uganda, Women Inheritance Law and Practices*",<sup>12</sup> gives examples of customary succession laws among the Baganda, Madi, Toro and the Lugbara and concludes that customary laws of those tribes do not recognize any trust or equitable contribution of a wife to matrimonial property other than chattels. That the family property is presumed to belong to husband and that it is in a rare case that courts or law have applied the doctrine of equality to protect the contributing interest of women to the family property. Further the above author discusses the law of inheritance in Uganda laying particular emphasis to state and intestate succession in a social economical and cultural aspect, Therefore bunging out factor that infringe on the rights of women in succession . She also points out that the law of succession is a testimony to the

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<sup>11</sup> Viga Bukenya a research paper 1990 Makerere University.

<sup>12</sup> Okuku - Wengi Jennifer, *The Law of Succession in Uganda* 1994



fact that Uganda women occupy an inferior status to the fact of women in society and this status rose primarily from customary law of succession practices by most indigenous communities in Uganda and so the application of the succession Act as amended by the decree which could have improved the inheritance rights of is difficult to apply due to such norms and customs. The author takes judicial approach to women's rights to property leaving out the social economic aspect of it. Further the fact that the book was written way back in 1993 at time before the promulgation of the constitution of 1995 leaves some gaps to be filled because with the new constitution in place and with specific provisions on affirmative action and ownership of the private property some laws too had to change and therefore the need for research to find out the relevance of the new laws concerning property ownership.

In a book titled "The Role of Property in the Family Structure",<sup>13</sup> the author states that the family is essentially attached to property and resources. The writer however, shows a situation whereby a woman is supported while the man appropriate property. Though the book does not conclude the status of women in particular it points out a situation where women do not own property but their needs are catered for by men while the man owns the family property as the head of the family. The author gives an example where a widow is expected to continue sharing from the family estate without individual entitlement to the husband's property.

## **1.9 CHAPTERISATION**

This paper will be divided into five chapters

Chapter 1 will discuss legal framework, under international instruments.

Chapter 2 will discuss legal framework, under municipal laws and customary law

Chapter 3 will contain applicability of the laws

Chapter 4 will look at gaps, overlaps and loopholes under existing law

Chapter 5 will cover recommendations and conclusions

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<sup>13</sup> Robert Gray, Family Estates in Africa, London Rutledge Kagan Paul Ltd 1964.

## CHAPTER ONE

### INTERNATIONAL INSTRUMENTS RELATING TO WOMEN RIGHTS

#### 1. Introduction

This chapter gives the legal frame work, under international instruments relating to women's rights to property. But before we look at the current international instruments it is prudent to look at the struggle of women to property rights in England since it was no different to what women are undergoing here in Uganda especially in the 19<sup>th</sup> century, in England where our law originated, the difference between the struggle of women in Uganda and England is that in England it was marked on individual struggle of women who were educated and tired of men oppression.<sup>1</sup> The property rights of women during most of the nineteenth century were dependent upon their marital status. Once women married, their property rights were governed by English common law, which required that the property women took into marriage, or acquired subsequently, be legally absorbed by their husbands. Furthermore, married women could not make wills or dispose of any property without their husband's consent.<sup>2</sup>

Marital separation, whether initiated by the husband or wife, usually left the women economically destitute, as the law offered them no rights to marital property.<sup>3</sup> Once married, the only legal avenue through which women could reclaim property was widowhood. Women who never married maintain control over all their property, including their inheritance.<sup>4</sup> These women could own freehold land and had complete control of property disposal. The notoriety of the 1836 Caroline Norton Case highlighted the injustice of women's property rights and influenced parliamentary debates to reform property laws.<sup>5</sup> The women's movement generated the support which eventually resulted in the passage of the Married Women's Property Law in 1882. England's mid-nineteenth century focus on married women's property rights culminated in the transformation of the subordinate legal status of married women.

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<sup>1</sup> [www.dd-rd.ca/site/publications/index.php?id=2208&page=5&subsection=catalogue](http://www.dd-rd.ca/site/publications/index.php?id=2208&page=5&subsection=catalogue)

<sup>2</sup> [www.unifem.org/attachments/products/womenslandproperty-rights.pdf](http://www.unifem.org/attachments/products/womenslandproperty-rights.pdf)

<sup>3</sup> [www.law-lib.utoronto.ca/diana/whrr/display\\_documents.cfm?iD=16&sisters=utl-](http://www.law-lib.utoronto.ca/diana/whrr/display_documents.cfm?iD=16&sisters=utl-)

<sup>4</sup> Dicken, Charles. *Great Expectations*. Ed. Janice Carlisle. Boston: Bedford, 1996.

<sup>5</sup> [www.unhabitat.org/downloads/docs/1556\\_72513\\_C5Dwomen.pdf](http://www.unhabitat.org/downloads/docs/1556_72513_C5Dwomen.pdf)

The property owned by women in Victorian England was usually inherited from fathers. To protect the status of their daughters, most fathers included them in the distribution of the patrimony, however, the type of property inherited by sons and daughters differed. Amy Louise Erickson notes that "Fathers normally gave their daughters shares comparable in value with those of their brothers, although girls usually inherited personal property and boys more often inherited real property". The more valuable real property inherited by the sons refers to freehold land, which is the actual land. Personal property referred to copyhold land, which was usually a mansion and its land held by a lord at will, and leasehold land, which was leased to individuals for life. Therefore, copyhold and leasehold land were legally secured for the life of the tenant or longer, depending on the agreement. Real property also included clothing, jewelry, household furniture, food, and all movable goods. However, social customs held that household property and equipment belonged to the women. According to Susan Staves, the personal property inherited by women was more vulnerable to loss in contrast to the more secure land holdings inherited by men.

In the absence of a will or specification of land distribution, the rules of primogeniture were invoked, giving the oldest son the rights to all real property. Daughters inherited real property only in the absence of a son, and it was held jointly between sisters. In the absence of a son, "the law preferred a daughter to collateral male" in England, unlike most of Europe, England's primogeniture laws remained intact until 1925. Although sons were entitled to a more substantial inheritance, daughters were beneficiaries of minimal or limited property distribution. Unmarried women, legally identified as *feme sole*, had complete legal control of their own property. They had the right to dispose of their property and only used the assistance of a legal guardian if they chose. The distribution of property in unmarried women's wills differs from men's in that these women gave preferences to their female relatives in dividing their property. This allowed female members of the family to live more comfortably, as women were more susceptible to a life of property. Unmarried women maintained control of their property as long as they remained unmarried.

However, whatever the distribution, the property which women took into marriage, whether in goods, money, or land, passed into the ownership of their husbands, which was dictated by common law doctrine of covertures. This law also dictated that when women married, their legal personalities were subsumed into their husbands. In response to the accusations of the injustice of property laws, lawmakers claimed that “the rights of the husband over the property of his wife are given him in consequences of the burthens which on the marriage are imposed on the husband in respect to his wife”. A digest of the common law states, “After marriage, all the will of the wife in judgment of the law is subject to the will of the husband; and it is commonly said a feme coverte hath no will”.

The term feme coverte is the common law term for wife, and “wife” is the only status entered” for women in the common law. The rationale of the law is that if husband and wife are “one body” before God, they are “one person” in the law, and that person is represented by the husband. In recognition of the law, fathers often provided their daughters with dowries to protect them from unscrupulous husbands. Prenuptial marriage settlement provided a means for separate “pin” money to be put in trust for a bride in order to provide her with income. Pin money is an estate which the wife was to possess for her sole and separate use and was not subject to the control of her husband. This dowry was the only separate property that married women could own and control in accordance with the law of coverture. Furthermore, married women were legal as well as economic non-entities.<sup>6</sup>

The legal status of married women prevented them from unilaterally participating in the civil legal system. Shanley explains that “from the legal ‘unity’ of the husband and wife it followed that a married woman could not sue or be sued unless her husband was also a party to the suit, could not sign contracts unless her husband joined her”. The law of coverture also governed women’s premarital legal contracts. Furthermore, married women lost the rights to execute their own wills since legally all their property belongs to their husbands. With their husbands’ consent, women executed wills to dispose of their personal property.

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<sup>6</sup> Laurence, Anne. *Women in England: 1500-1760, A Social History*. New York: St. Martin’s, 1994.

The laws that allowed married women to recapture property rights through widowhood were revised in the early nineteenth century. Once widowed, women were entitled to a dower, which was usually equivalent to one third of the husband's estate. The dower is the portion of the deceased husband's estate that his widow inherited for life. This inheritance did not represent a return of property that had been brought by women into the marriages. Women's dower rights during the eighteenth century were restricted by common law and dower rights regarding real property changed to reflect economic changes in England. This change was viewed as an erosion of women's property rights as widows were only entitled to an equitable jointure of their husband's estate. Jointure assignments were an arrangement by which a husband settles property on his wife for her use after his death. The assignment of jointures deprived widows of legal rights over their husband's estates and allowed the valuable real property, which was land, to be left to male heirs. Estates in jointure were no longer required to be an estate in freehold land. Furthermore, men found other ways to defraud women of dower rights. Men in contemplation of marriage could and often did convey their property to trustees in order to, as they said, "avoid the inconvenience of dower attaching and for other purposes". Widows usually received substantially less valuable property than male heirs. However, unlike married women, they exercised control over the property and its disposal through wills.<sup>7</sup>

Although widows were prevented from amassing great amounts of wealth, through their repositioned legal status of *feme sole*, they reclaimed legal power over their property. Widows were free to manage and establish businesses and to secure freehold land. Widows who remarried also had legal rights to prevent husbands from attaching themselves to the women's property. This autonomy made widows less economically desirable than unmarried women because "the growing sophistication of the trustee system ... gave a widow greater ability to protect from being squandered by her second husband for his own benefit". Most widows who remarried were interested in protecting their property, especially on behalf of their children from their first marriage. Widowed women, like their unmarried counterparts, also gave special consideration to female

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<sup>7</sup> Erickson, Amy Louise. *Women and Property in Early Modern England*. London: Routledge, 1993.

relatives in conveyance of their property. Although widows maintained more autonomy than married women regarding property rights, unhappy or abused women who sought refuge from marriage through separation completely forfeited rights to their husband's financial support and property.

The Caroline S. Norton case attracted attention to the severe economic penalties which women endured when they separated from their husbands. Mrs. Norton was a popular poet, novelist, and a beautiful English socialite who attempted to separate from her husband in 1836. After leaving her marital home, her husband prevented her from seeing their three sons and severed her financial support. After her husband's unsuccessful attempt to prove her guilty of an adulterous affair, Caroline filed for divorce on the ground of cruelty. Her claim was rejected, as English law did not recognize cruelty as just cause for divorce. Caroline Norton had no rights to sue for divorce, and could not force her husband to maintain her financial support. She was also unable to gain access to any of the marital property. Abandoned financially by her husband, Caroline Norton began writing to support herself. However, because she was still married, her husband as legally able secures much of her earnings for himself. According to Dorothy M. Stetson, Mrs. Norton "suffered all of the worst fates of a feme coverte as a result of her separation. Her husband exercised his legal right to deny her visits to her children". The Caroline Norton case spotlighted the injustice of married women's property rights in England.<sup>8</sup>

Caroline Norton proved to be a catalyst for changing women's property rights laws in Victorian England. Caroline Norton was determined to use her personal misfortune and suffering to gather support for legal reform. She gathered attention and support for her cause through the publication of many pamphlets and the influence of her friends in parliament. In 1855, Caroline Norton published her most important pamphlet: *A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill*, in which she reviewed the position of married women under English law:

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<sup>8</sup>Helsing, Elizabeth, Robin LAuterbach Sheets, and William Veeder. *The Woman Question: Social Issues 1837-1883*. new York: Garland, 1983.

1. A married woman has no legal existence whether or not she is living with her husband;
2. Her property is his property;
3. She cannot make a will, the law gives what she has to her husband despite her wishes or his behavior;
4. She may not keep her earnings;
5. He may sue for restitution of conjugal rights and thus force her, as if a slave to return to his home;
6. She is not allowed to defend herself in divorce;
7. She cannot divorce him since the House of Lords in effect will not grant a divorce to her;
8. She cannot sue for libel;
9. She cannot sign a lease or transact business;
10. She cannot claim support from her husband, his only obligation is to make sure she doesn't land in the parish poorhouse if he has means;
11. She cannot bind her husband to any agreement.

In short, as her husband, he has the right to all that is hers; as his wife she has no right to anything that is his.

Caroline Norton, along with other feminist writers, helped to promote support for change in property rights for women.

In 1857, the Divorce and Matrimonial Causes Act was passed, establishing new divorce and matrimonial property laws. Along with removing divorce matters from the control of parliament and the ecclesiastical courts, it also secured some property rights for married women. The Act was not intended to change the financial status of married women, only to grant property rights to wives who were separated from their husbands.

The judgment, which reestablished a legal status of feme sole to married women allowing for the rights to earning, savings, and investments, was only granted to deserted wives. However, the act maintained men's legal rights to all marital property. Although the

changes in law only slightly shifted to affect women's property rights, it elevated separated married women to the same legal standing as their husbands regarding lawsuits for contract and tort. Since the Divorce and Matrimonial Causes Act did not affect the rights for women who were living with their husbands, or those who were left by their husbands but not officially deserted, feminists continued to demand equal rights for married women.<sup>9</sup>

The 1857 Divorce Act only protected a small number of women; "it soon became clear that these small concessions ... would not be enough to even answer the worst hardship cases. The act did not affect wives living with their husbands. The demands for reform continued, and resulted in the passing of the Married Women's Property Act in 1870. However, this act was criticized as it, "was fraught with compromise and contradiction: it allowed women to keep possession only of their earnings and to inherit personal property and small sums of money; everything else, whether acquired before marriage or after, belonged to the husband". Although women were not granted all the property rights they demanded, the Act did represent an advance. The government resisted granting any significant rights to women and the few rights they granted came slowly and sporadically. In 1882, the twenty-seven year campaign for women's property rights culminated in the Married Women's Act of 1882. The Act, according to Stetson, "altered the common law doctrine of coverture to include the wife's right to own, buy, and sell her separate property". This act obligated the courts to recognize a husband and a wife as two separate legal entities.<sup>10</sup>

England's nineteenth century is signified by major reforms in the subordinate legal status of women. The women's movement waged a long-term campaign to create more equity within English laws that included rights to education and suffrage as well as property rights. Initially, this resulted in minor reforms of divorce and property laws. Despite the fact that some legally separated women were granted more power over property than was previously allowed the new laws did not protect the overwhelming majority of married

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<sup>9</sup> May, Trevor. *An Economic and Social History of Britain: 1760-1970*. New York: Longman, 1987.

<sup>10</sup> Staves, Susan. *Married Women's Separate Property in England, 1660-1833*. London: Harvard Up, 1990.



women. Unfortunately, the legal system and individual men attempted to maintain the status quo of keeping women firmly subordinate. It was not until 1882 that married women were able to exercise separate rights over their inheritance, earnings and property.<sup>11</sup>

The international instruments that provides for these rights are the Universal Declaration of Human Rights, the International Covenants on Political and Civil Rights, International Covenants on the Elimination of all forms of racial discrimination, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights has several provisions relating to property rights of women and these include;

**Article 2**

Everyone is entitled to all rights and freedoms set forth in this declaration without any distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 7**

Provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.

**Article 16 (1)**

Provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family, they are entitled to equal rights as to marriage during marriage and its dissolution.

**Article 17 (1)**

Provides that everyone has the right to own property alone as well as in association with others.

**(2)**

No one shall be arbitrarily deprived of his property.

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<sup>11</sup> Shanley, May Lyndon. *Feminism, Marriage, and the Law in Victorian England, 1850-1895*. Princeton: Princeton UP, 1989.

## **1.1 The International Covenant On Civil And Political**

### **Rights**

Article 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination of any ground such as race, color, sex, language, religion, political or other opinion, national or social origin property, birth or other status. The property rights of women during most of the nineteenth century were dependent upon their marital status. Once women married, their property rights were governed by English common law, which required that the property women took into marriage, or acquired subsequently, be legally absorbed by their husbands. Furthermore, married women could not make wills or dispose of any property without their husband's consent.<sup>12</sup> Marital separation, whether initiated by the husband or wife, usually left the women economically destitute, as the law offered them no rights to marital property.<sup>13</sup> Once married, the only legal avenue through which women could reclaim property was widowhood. Women who never married maintain control over all their property, including their inheritance.

The promulgation of Article 26 of the International Covenant on Civil and Political rights was intended to eliminate such injustice of discrimination against women on the basis of acquiring property.

## **1.2 The International Covenant on Elimination on all Forms of Racial**

### **Discrimination**

Article 5 (v) and (vi) provides to the effect that in compliance with the fundamental obligations laid down in Article 2 of this Convention. State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.

(d) (v) the right to own property alone as well as in association with others.

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<sup>12</sup> [www.unifem.org/attachments/products/womenslandproperty-rights.pdf](http://www.unifem.org/attachments/products/womenslandproperty-rights.pdf)

<sup>13</sup> [www.law-lib.utoronto.ca/diana/whrr/display\\_documents.cfm?iD=16&sisters=utl-](http://www.law-lib.utoronto.ca/diana/whrr/display_documents.cfm?iD=16&sisters=utl-)

(vi) the right to inherit.

The property owned by women was usually inherited from fathers. To protect the status of their daughters, most fathers included them in the distribution of the patrimony, however, the type of property inherited by sons and daughters differed.

Fathers gave their daughters shares comparable in value with those of their brothers, although girls usually inherited personal property and boys more often inherited real property". The more valuable real property inherited by the sons refers to freehold land, which is the actual land. Personal property referred to copyhold land, which was usually a mansion and its land held by a lord at will, and leasehold land, which was leased to individuals for life. Therefore, copyhold and leasehold land were legally secured for the life of the tenant or longer, depending on the agreement. Real property also included clothing, jewelry, household furniture, food, and all movable goods. However, social customs held that household property and equipment belonged to the women.

In such form of discrimination in society especially a society where there is patrimony, Ugandan women find themselves in an unfair position and hence need of laws to protect women against discrimination of all manners especially when it comes to acquiring of property during marriage and in succession, hence the promulgation of the International Covenant on Elimination on all Forms of Racial Discrimination.<sup>14</sup>

### **1.3 The International Covenant on Economic, Social and Cultural Rights**

Under Article 3, its provided that, state parties to the covenant shall undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the covenant.

The introduction of colonial administration in Africa and the introduction of a colonial cash economy, men dominated the economy and got an advantage of education over women. Coupled with customs that would not educate girls nor would they consider them

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<sup>14</sup> Stetson, Dorothy. *A Woman's Issue: The Politics of Family Law Reform in England*. London: Greenwood, 1982.

as capable of leading them. This made women to be oppressed by men because men were highly educated and could earn good income. Furthermore, lack of education made women to be ignorant of their rights hence leaving oppressed life. The promulgation of the International Covenant on Economic, Social and Cultural Rights was intended to eliminate such injustices and countries which ratified to it were obliged to ensure that the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the covenant.

In Uganda, as elsewhere in the world, unequal access to land is one of the most important forms of economic inequality between men and women and has consequences for women as social and political actors. Women provide 70-80 percent of all agricultural labor and 90 percent of all labor involving food production in Uganda, yet they own only a fraction of the land. Similar patterns are found elsewhere in Africa. Women are generally responsible for providing for the household; therefore their access to land for food production is critical to the welfare of the entire household. Since women are almost completely dependent on men to access land, women who are childless, single, widowed, disabled, separated/divorced, or with only female children often have little or no recourse because they may have no access to land through a male relative.

#### **1.4 The African Charter on Human and People's Rights**

Article 18 (3) states that the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in International Declarations and Conventions.

##### **Article 21**

1. All people shall freely dispose off their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation.

In May 2003, the leading women's rights organization held a demonstration around land rights that was led by an opposition parliamentarian from Northern Uganda, Nobert Mao. The new realization forced women to rethink their strategies and allegiances. It put loyalties of key women politicians to the test and forced them to make difficult choices between support for the women's movement and a political career endorsed by the president and his movement.

The co-ownership amendments were, in fact, passed by the parliament, but political maneuvering on the grounds of technicalities left women without the clause. Member of Parliament and Ethics Minister Miria Matembe was about to read the amendments into the microphone for the Hansard when she was interrupted in mid sentence by someone who said they were finished and that she did not need to read them. Later she was told that because she had not read the clauses into the microphone, they could not be included in the Hansard and hence, into the amendments to the Land Act.

The African Charter on Human and People's Rights was promulgated with the aim of eliminating all forms of dictatorial rule and tyranny that made non observance of human rights a no issue at all especially when it came to women and property rights.

## **CHAPTER TWO**

### **MUNICIPAL LAWS AND CUSTOMARY LAW RELATING TO WOMEN'S PROPERTY RIGHTS**

#### **2. Introduction**

This chapter will discuss legal framework, under municipal laws and customary laws. The municipal law concerning women's rights to property is also not found in one source book but ranges from the Constitution of the republic of Uganda to the statutory laws as well as customary law.

#### **2.1 How the Current Municipal Law Evolved**

Much of the literature on women and land tenure in Africa has viewed the introduction of land titling, registration, and the privatization of land under colonialism and after independence as a setback for women, leaving women in a state of even greater insecurity with poorer prospects for accessing land and hence obtaining a livelihood.

Customary land tenure systems were eroded and transformed in ways that were disadvantageous to women. Today, the prevailing policy and much of the scholarly wisdom, from perspectives as ideologically diverse as the World Bank, Oxfam, and many feminist development studies scholars, seem to have converged around the view that sees land tenure policy as building on customary systems. The conveyance does not, however, rest on identical premise. The World Bank, for example, sees the reliance on customary arrangements as a simpler and less conflictual route to the eventual titling, registration, and privatization of land ownership, whereas Oxfam sees the reliance on customary systems as a way to strengthen and democratize local communities, and promote bottom-up grassroots initiatives.<sup>15</sup>

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<sup>15</sup> Delninger, K (2003). Land Policies for Growth and Poverty Reduction. Oxford, World Bank and Oxford University Press.

Thus, one of the most dramatic changes in land tenure reform today is that, for the first time since the pre-colonial period, states are giving legal recognition to existing African regimes, which are being treated on par with the freehold/leasehold systems.<sup>16</sup> Unregistered customary tenure, which is the main system of land rights in Africa, is being recognized in the new policies. Ironically, at the very time that these gains are being won in the name of the rural poor, the pastoralists, women, and the landless, African women have mounted new movements to eradicate customary land tenure practices and fight for the rights of women to be able to inherit, purchase, and own land in their own name. Feminist lawyers working with these movements have argued that customary law in the present day context has been used to selectively preserve practices that subordinate women. Rather than seeing customary land practices as a basis on which to improve women's access to land, they are advocating for rights-based systems that improve women's ability to buy, own, sell, and obtain titles on land. In the case of Uganda, this has gone further than most African countries to devolve land administration to the local level, while at the same time giving rise to one of the most active women's movement challenging customary land tenure practices. If women were benefiting from customary land tenure arrangements, one would think the preservation of customary rights or modifications in the customary systems would have been desirable goals of the movement.

Women have adopted a variety of strategies to claim land but because women's ties to land are mediated by their relationship to men in patrilineal societies, women's attempts to assert their rights in ways that challenge customary land tenure systems is often perceived as an attempt to disrupt gender relations, and society more generally. This explains why so much is at stake in these battles over women's rights to land, and why women's gains in this area have been so slow.

This shows how bases of customary ownership have been eroded since the time of colonialism, making women's access to land significantly more precarious as the

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<sup>16</sup> Wily, L. A (2000) "Land Tenure Reforms and the Balance of Power in Eastern and Southern Africa" Overseas Development Institute 2000 58

protections traditionally ensured by the clan system have been peeled away. In recent years, local leaders have felt mounting pressures to protect the clan system, and in so doing have placed even greater constraints on women's access to land. In particular, men and groups of men, organized through their lineage, have sought to renegotiate and redefine the formal and informal relationships that in the past supported women's access to land.<sup>17</sup> However, the clan system they are seeking to preserve is no longer one that affords women, both rural and urban, have responded to the renewed interest in protecting customary laws and practices through collective strategies, which in Uganda have included a movement to ensure women's access to and ownership of land. Women have also adopted individual strategies of purchasing land and taking their land disputes to court. Purchasing land has in effect, become a way of circumventing the traditional authorities.

In Uganda, the reform of tenure administration has been the most extensive and decentralized. Newly created district land boards administer land, supported by a network of 4,500 local land committees. The laws shift land tenure administration to the elected government of each village, which is in charge of adjudication, registration, titling land, and land dispute resolution. This means that there are 9,225 discrete tenure administrations that are in charge of all but property held directly by government. By keeping control of land within the communities, the aim is to prevent the appropriation of customary land by wealthier outsiders, often through unscrupulous means.<sup>18</sup>

Women have been at the forefront of organizations like the Uganda Land Alliance, which has fought for the land rights of women, pastoralists, the landless, and other marginalized people. Regional networks like Landnet in East Africa have also formed to network between countries. At the same time, key women's organizations have been active around issues in and have often played a leading role in forming the broader land alliances. At the regional level in East and Southern Africa, women and law in development in Africa

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<sup>17</sup> Gray, L and M Kevane (1999), "Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa" *African Studies Review* 42 (2):15-39

<sup>18</sup> Wily L. A (2000) "Land Tenure Reforms and the Balance of Power in Eastern and Southern Africa" Overseas Development Institute 2000 58



(WILDAF) has been active since the early 1990s on land and other issues, as has Women and Law in Southern Africa (WLSA) in seven Southern African countries.<sup>19</sup> These movements have been especially pronounced in the former British colonies of Eastern and Southern Africa, although one is increasingly seeing similar movement pressures for land rights in Nigeria and francophone countries like Mali, Senegal, and Madagascar, where women formed their own organizations to ensure that any changes in land laws incorporate women's concerns.

The new movements have been galvanized by mounting land pressures in some countries that are placing undue constraints on women, who do not have sufficient access to and control over land. While the focus of the women's movements have been on customary land practices, they have also been concerned with the negative effects of the privatization of land and land grabbing as governments have increasingly sought foreign investment through tourism, mining, and other businesses. Women have joined forces with pastoralists, who have often found themselves shut out of vast grazing lands in many parts of East Africa, Botswana and Namibia as a result of large land sales.<sup>20</sup> The Beijing UN Women's Conference in 1995 and the national and regional discussions leading up to the conference also heightened awareness regarding land issues and helped foster these movements.

Women's movements have been particularly concerned that heightened protection of customary land tenure arrangements has taken place in a context where the customary and religious laws and practices that have been retained have selectively preserved those elements that subordinate women. These arrangements have included customary divorce and inheritance practices, keeping women as minors, bride wealth, widow inheritance (levirate), dehumanizing rituals pertaining to widows, early childhood marriage,

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<sup>19</sup> Sebina-Zziwa, A. R Kibombo, et al (2002), Patterns and trends of women's participation in land markets in Uganda, 8<sup>th</sup> Edition. International interdisciplinary congress on women, Kampala, Uganda, Makerere Institute of Social Research Makerere University.

<sup>20</sup> Palmer, R (1998), Oxfam GB's Land Advocacy work in Tanzania and Uganda: the end of an era, Oxford, Oxfam.

polygamy, and female genital cutting.<sup>21</sup> It should be noted that there are a few countries where some women's organizations (e.g. women for change in Zambia) are fighting for women's rights by seeking to preserve and at the same time encourage traditional authorities to adopt more pro-women policies and more especially Uganda.

Uganda has a vibrant women's movement that emerged after 1986, when His Excellency Yoweri Museveni and his National Resistance Movement took over the country through guerrilla war. There has been a proliferation of independent organizations that have taken up a wide variety of issues ranging from women's representation in office, to domestic violence, rape, reproductive rights, sex education in the school curriculum, and many other concerns. One of the key issues that have galvanized the women's movement has to do with reform of customary land tenure arrangements.

Four basic land tenure systems emerged in Uganda after colonialism and they have constantly been in flux: 1) Freehold tenure involves holding of registered land in which the holder has full ownership rights; 2) Leasehold tenure involves land leased for a specific period under certain conditions; 3) Mailo land tenure involves holding registered land in perpetuity. This system has its roots in the 1900 Buganda Agreement between Buganda and the British. In the central Uganda region of Buganda, the clan system was undermined with introduction of the mailo system, but mailo land is still subject to clan and lineage head approval. The Land Law of 1908 gave freehold titles for large tracts of land to the king, his family, and the clan chiefs. About 4,000 individuals received land in this way.

As a result very few women came to own mailo land. Others could gain access to this land by purchasing it from the original recipients and their descendants. 4) Customary tenure means a system of land tenure regulated by customary rules often administered by clan leaders. The customary system predominates in Uganda. Within this system there

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<sup>21</sup> Ewelukwa, U. U. (2002), Hodgson (2002) "Colonialism, Gender, and Customary Injustice: Widows in African Societies." *Human Rights Quarterly* 24 (2): 424-486.

can be both individual and communal land ownership, but the land is not generally titled or registered.<sup>22</sup>

It is within this context that women have sought to ensure women's rights to land. The women's movement was active at all stages in the process of drafting the 1995 Ugandan Constitution, which had major implications for female land ownership. Women's organization from throughout the country submitted memoranda to the Constitutional Commission pertaining to women's rights; women activist lawyers served on the constitutional assembly were women, many of whom were active in a non-partisan Women's Caucus that pressed for women's rights. They were able to get significant concessions in the constitution, including legal equality and protection in political, economic, social and cultural spheres along with the prohibition of laws, cultures, customs, or traditions that violate the dignity, welfare, or interest of women.

Women activists also targeted the 1998 Land Act. The Land Act was passed to create a system of tenure, ownership, and administration of land. It was also to improve land service delivery by decentralizing land administration. Women activists made sure that key clauses were included in the Land Act to protect women. One provision in the Act requires the prior written consent of both spouses in transactions involving family holdings, Section 39 of the Land Act Cap 227. The Act prohibits decisions pertaining to customary land that deny women access to, ownership of, or occupation of land. The Act requires that the Uganda Land Commission should have at least one female out of its five members Section 47(4) of Land Act Cap 227, one third of the membership of the District Land Boards should be female Section 57(3) of Land Act Cap 227, and land committees at the parish level should have at least one woman out of the four members. In addition, at least one-third of the Communal Land Management Association members must be women. These associations are legal entities under the Land Act that may be formed by anyone for the purpose of communal land ownership and management.

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<sup>22</sup> Gender Perspective in the Land Reforms process in Uganda, M Rugadya and H. Busingye Kampala, Uganda Land Alliance; 102-110.

In the period leading up to the passage of the 2000 amendments to the Land Act, women's rights activist and organizations also lobbied without success for the inclusion of a co-ownership clause into the Land Act. They networked under the rubric of the Uganda Women's Network (UWONET) and the Uganda Land Alliance (ULA) and coordinated lobbying efforts. It is the struggle over this co-ownership clause that has brought to a head the conflict women activist have confronted with customary land practices. Co-ownership of land between spouses and/or family members is controversial in most African countries, especially those undergoing land reforms.

The insistence on the co-ownership clause stems from the fact that current legislation, given customary practices, provides limited possibilities for women to own land. In patrilineal societies, which are most prevalent in Uganda, women generally do not inherit land from either their fathers or their husbands. Their fathers often do not bequeath land to their daughters because daughters marry outside the clan, and will therefore take the land with them to another clan. Husbands often do not bequeath land to their wives for the same reason: they need to ensure that the land remains in the clan because they worry that the widow might sell the land to non-clan members. In some societies in Uganda, if the husband dies, the wife and children are inherited by the husband's brother or another family member so that he may provide for them. This practice is dying out, raising fears that if a widow remarries outside the clan, the clan land she has acquired is lost.

Thus under customary law, which prevails in Uganda, a woman may have jointly acquired land with her husband and may have spent her entire adult life cultivating the land, but she cannot claim ownership of the property. If he dies, the land generally goes to the sons, but may also be left to daughters. Nevertheless, he may still leave the wife with no land and therefore no source of subsistence.

Land is the most important resource in Uganda because people depend on it for cultivation and therefore their livelihoods. In Uganda, as elsewhere in the world, unequal access to land is one of the most important forms of economic inequality between men

and women and has consequences for women as social and political actors.<sup>23</sup> Women provide 70-80 percent of all agricultural labor and 90 percent of all labor involving food production in Uganda, yet they own only a fraction of the land. Similar patterns are found elsewhere in Africa. Women are generally responsible for providing for the household; therefore their access to land for food production is critical to the welfare of the entire household. Even women who want to get into business need land as collateral to obtain bank loans. Since women are almost completely dependent on men to access land, women who are childless, single, widowed, disabled, separate/divorced, or with only female children often have little or no recourse because they may have no access to land through a male relative.

The struggle over the co-ownership clause was a turning point in many ways for the women's movement. Up until this conflict, the women's movement had been enthusiastic about President Museveni and his pro-women policies.

They had seen his National Resistance Movement, more commonly known as "the movement" as a force for change for Ugandan women. As a result of Museveni's failure to back the clause, many in the women's movement became seriously disillusioned with the government's positions regarding women's rights. In May 2003, the leading women's rights organization held a demonstration around land rights that was led by an opposition parliamentarian from Northern Uganda, Nobert Mao. The new realization forced women to rethink their strategies and allegiances. It put loyalties of key women politicians to the test and forced them to make difficult choices between support for the women's movement and a political career endorsed by the president and his movement.

The co-ownership amendments were, in fact, passed by the parliament, but political maneuvering on the grounds of technicalities left women without the clause. The then member of Parliament and Ethics Minister Miria Matembe was about to read the amendments into the microphone for the Hansard when she was interrupted in mid sentence by someone who said they were finished and that she did not need to read them.

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<sup>23</sup> Aganwal, B (1995), *A field of one's own: Gender and Land Rights in South Asia*, Cambridge, Cambridge University Press.

Later she was told that because she had not read the clauses into the microphone, they could not be included in the Hansard and hence, into the amendments to the Land Act.<sup>24</sup>

In February 2000 when the Minister of State for Lands brought the amendments to the Land Act before cabinet, it was the president, by his own omission, who decided to pull out the co-ownership clause. As explained, he foresaw a disaster and advised them to go slow or pass the clause along for consideration with the pending Domestic Relations Bill (DRB). "When I learnt that the Bill was empowering the newly-married women to share the properties of the husbands, I smelt a disaster and advised for slow and careful analysis of the property sharing issue," President Museveni said.<sup>25</sup> Women activists argued that moving the clause to another bill was unconstitutional because the decision should have been put to the House. It was believed that the president's decision to shift the clause to the DRB was intended to save face so that the government would not appear anti-woman. But the effect would be to remove the issue from the agenda altogether.<sup>26</sup>

The contemporary land tenure regimes, which generally include a mix of customary, statutory, and religious legal arrangements, have their origins in the early colonial period of consolidation in which colonialists left family and community concerns such as land under the jurisdiction of "customary law" and customary courts. Colonial civil courts adjudicated criminal law. After the 1930s the customary tenure arrangements had become an obstacle to changing colonial objectives that now incorporated the promotion of economic growth through agricultural production. The new goals were predicted upon the state's fostering of the emergence of a freehold system and individual property of land ownership.<sup>27</sup>

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<sup>24</sup> Asiimwe, J (2001a) "Practitioner's Note: Making Women's Land Rights a Reality in Uganda; Advocacy for Co-ownership by Spouses" *Race Human Rights and Development Law Journal* 4:171-187

<sup>25</sup> Share parents property Museveni tells women (New Vision 10<sup>th</sup> May 2000); 6-7

<sup>26</sup> <http://web.africa.ufl.edu/asq/u7/v7/4al.htm>.

<sup>27</sup> Bassett, T. J (1993), *Introduction Land in Africa Agrarian Systems*. T Basset and D. E Crummey, Madison, University of Wisconsin Press.

It is often argued that with the introduction of private property systems, women lost out in these new arrangements because their rights to land through husbands, fathers, or sons diminished in importance. By titling and registering land, colonial governments eliminated the importance of secondary rights of women to access land and men increased their control over land.<sup>28</sup> Legal measures were seen as a way to diminish the importance of clan and communal control over land and instead placed individual men in ownership of land parcels. Women were in this way sidelined, without the necessary legal claims to land. Their ability to inherit land was diminished by male elders who gained in importance as legal land owners. It should be pointed out that the notion of individual rights was not a new one. Informal land sales have a long history in Africa dating at least back to the early colonial period, but the individual rights of indigenous tenure systems were not the equivalent of contemporary notions of private property. For example, the Bakiga in Uganda, land rights are embedded in concrete local practices, social relations, obligations and responsibilities and they don't have much meaning in the abstract. Land ownership as a concept similarly does not have the same meaning as we might think of when we think of individual property ownership.<sup>29</sup>

With the privatization of land, women not only lost their legal claims to land, but they also did not have control over the cash that men did in order to purchase the land. Moreover, they did not own land that would have permitted them to accumulate capital with which to purchase land. They generally did not control the additional labor to work the fields, nor the animals and farm tools, nor did they control the income from the sale of crops – all of which made it difficult for them to access capital with which to purchase land of their own. In other instances women's purchase of land was predicted upon the approval and signature of a male relative. There was also outright discrimination on the part of land administrators against the sale of land to women.<sup>30</sup>

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<sup>28</sup> Gray and Kevane (1999), "Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa" *African Studies Review* 42 (2):15-39

<sup>29</sup> Bosworth, J. L (1995), *Land Tenure Systems in Sub-Saharan Africa*, Faculty of Social Studies, Oxford University.

<sup>30</sup> Lastarria – Cornhiel, S (1997). "Impact of Privatization on Gender and Property Rights in Africa" *World Development* 25(8): 1317-1333.

There is literature that shows how women's rights to land were curtailed by the onset of colonialism, not just through the titling and registration of land but also through dramatically changed patterns of land use and occupancy. The emphasis on cash crop production diminished the importance of women's subsistence production, and sharpened gender segregation in the division of labor in a way that disadvantaged women. Land scarcity and increase in land value made it even more difficult for women to access land.<sup>31</sup>

Beginning in the early 1970s, the World Bank, which has been a major influence on African macroeconomic policies as well as land policy, initially pushed for land reform with a strong emphasis on individual ownership through registered freehold titled land. The bank funded a series of land registration and titling projects in the 1980s. Their aim was to promote development by eliminating communal tenure systems through more efficient land use and more secure land ownership. As the World Bank policies were implemented, a key study in 1994 found that security of title was not sufficient to invest in land and increase production due to other exogenous factors like land abundance, farm size, and access to credit and water. Moreover pastoralists and other seasonal users of land were losing out as land became titled and registered.<sup>32</sup> These findings led to policies that involved the more selective and gradual introduction of titling and registration. The Land Policy Division of the World Bank, for example, has sought to encourage a combination of customary and privatized land arrangements and to encourage the natural evolution of privatized land as a result of commercialization and the intensification of land pressures.

Nevertheless, there is a general difference in orientation between contemporary African women's movements and those who are seeking to secure women's rights through customary arrangements. Some of these differences can be found in two strands of gender analysis within the World Bank African Region Division. One strand in the Bank works

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<sup>31</sup> Davison, J (1988), *Land and Women's Agricultural Production: The Context, Agriculture, Women, and Land: The African experience*. J. Davison Boulder, Westview Press.

<sup>32</sup> Bruce, J. W and S. E. Migot – Adholla (1994), *the findings and their policy implications: Institutional Adoption or Replacement searching for land Tenure Security in Africa*. J. W. Bruce and S. E. Migot-Adholla Dubuque Fowa, Kendall/Hunt Publishing Company.



on issues of gender, growth, and poverty and looks at how women's lack access to inputs and resources like land, as well as their disadvantaged bargaining position within the household, results in negative developmental outcomes. In the contemporary context, some policymakers see legal reforms regarding land as serving little purpose in the absence of women's education and economic independence.

Law, according to Gita Gopal of the World Bank, can only be a catalyst to expedite a process of change, but its actual ability to bring about change, especially in the household arena, is limited; *"developing countries are strewn with epitaphs of irrelevant laws that proposed norms that were unacceptable to those affected by the law"*. Rather than introducing *"complex foreign institutional and regulatory models,"* Gopal advocates a more gradual institution building approach. Legal reforms, she argues, have undermined local systems of adjudication and create rigidity in customary laws that prevent them from being modified and used flexibly. This has the net effect of leaving women unprotected in both the formal legal system and the informal customary system. For Gopal, unwritten customary systems offer women more options than legal reforms.

Customary adjudication is not based on rules and laws in the same way that formal legal systems are structured. Customary practices are fluid because they are socially embedded and are based on evolving local social and political relations. But this can potentially help or hurt women, and at a time when the clan leaders feel under siege and land scarcity is great, women have no guarantees that their just claims will be given their full consideration.

The other approach found in the Bank, endorsed by the Gender and Law in Africa group supports networks of feminist lawyers that have developed a right based discourse that comes out of the *"women's rights as human rights"* approach of the 1990s. These views, which fit the orientation of the African women's movements, became especially evident during the preparations for the 1995 Beijing conference. They focused on legal reforms that were increasingly seen as key women's emancipation, and in particular, on

constraints imposed by customary laws and practices and problems of implementing anti-discrimination laws.

In Uganda the legal framework of the laws that provide for the rights of women to property is as follows

**Article 2 of the Constitution of the Republic of Uganda provides that;**

1. The constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.
2. If any other law or any custom is consistent with any of the provisions of the constitution, the constitution shall prevail and that other law or custom shall, to the extent of the inconsistency be void.

Further, under chapter four of the Constitution, it is stated that rights and freedoms of the individuals and groups enshrined in this chapter shall be respected, uphold and promoted by all organs and agencies of government and by all persons.

Article 21 (1) also provides for equality before the law and freedom from any kind of discrimination.

Article 26 of the same Constitution provides to the effect that;

1. Every person has a right to own property either individually or in association with others.

Article 30 (i) provide that: men and women of the age of 18 years and above have the right to marry and found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

2. Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parent's right over their children.

Article 33 (1) provides that women shall be accorded full and equal dignity of the person with men.

3. The state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them realize their full potential and advancement.
4. The state shall protect women and their right taking into account their unique status and nature maternal functions in society.

5. Women shall have the right to equal treatment with men and the right shall include equal opportunities in political, economic and social activities.
6. Without prejudice to article 32 of the constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
7. Laws, cultures, customs or traditions which are against the dignity welfare of interest of women of which undermine their status are prohibited by the constitution.

## **2.2 The Succession Act Chapter 162, Laws of Uganda.**

The act regulates matters pertaining to cases of the testamentary of intestate succession.

Section 3 of the act states that no person shall by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

Section 27 of the same act states that the manner in which the estate of a deceased person dying intestate except the residential holding is divided among the classes of people stated under. For instance wife or wives receive 15 percent of the estate.

Further, section 27 (ii) states that no person entitled to any interest in a residential holding under section 26 (i) shall be required to bring that interest into account in assessing any share in the property of an intestate to which that person may be entitled under section 27.

On the other hand section 30 provides that the wife or husband of the intestate shall not take any interest in the estate of an intestate, he or she was separated from the intestate as a member of the same house hold.

## **2.3 The Land Act Cap 227 Laws of Uganda**

Section 27 of the above, provides that any decision taken in respect of land held under customary tenure, whether in respect of land held individually or commonly, shall be in accordance with the customs and traditions and practices of the community concerned, except that a decision which denies women or children or persons with disability access to ownership, occupation or use of any land or imposes conditions which violate Article

33, 34 and 35 of the constitution of any ownership, occupation or use of any land shall be null and void.

Section 39 (i) of the same act, as amended 2004, on the other hand provides that no person shall sell, exchange, transfer pledge, mortgage or lease any land, enter into any contract for the sale, exchange, transfer pledge mortgage or lease of any land or give away any land intravenous or enter into any other transaction in respect of land – in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse.

#### **2.4 The Divorce Act Chapter 249 Laws of Uganda**

Section 15 of the act states that where a judicial separation has been decreed under this Act,, the wife shall from the date of that decree while the separation continues be considered as unmarried with respect to property which she may acquire or devolve upon her, and if she again cohabits with her husband whatever property she holds will be hold to her separate use subject however to any agreement in writing made between herself and her husband while separated.

According to section 26 of this Act, when a decree of dissolution of marriage or of a judicial separation is pronounced as an account of adultery by the wife and the wife is entitled to any property, the court may notwithstanding the existence of the disability of coverture order the whole or any part of the property to be settled for the benefit of the husband, or of children of the marriage or both.

#### **2.5 The Administrator General's Act Chapter 157 Laws of Uganda**

This Act relates to the administration of Estates of deceased persons by the Administrator General.

Section 11 provides that when a person dies whether within Uganda or outside Uganda, leaving property within Uganda, any person who without being duty authorized by law or without the authority of the Administrator General or an agent takes possession or causes to be moved or otherwise intermeddles with any such property except in so far as may be urgently necessary for the preservation of the property, or unlawfully refuses or neglects

to deliver any such property to the administrator general as his or her agent when called upon to do so, commits an offence.

Under section 16 of the same Act, the administrator general may subject to any wishes which may be exposed of the next of kin of the deceased, dispose off the property or an estate under his or her administration whether wholly or in part and whether by public action or private treaty as he or she in his or her discretion may deem to be in the best interest of the estate.

## **2.6 Customary Marriage (Registration) Act Cap 248, Laws of Uganda**

The customary law concerning property rights is not written, however all the tribes in Uganda acclaim one fact that property is owned by the patriarchs who care and maintain the family by virtue of their status as fathers. Women therefore do not own or inherit property but simply use what is acquired by their husbands.

## **CHAPTER THREE**

### **3. APPLICABILITY OF THE LAW**

#### **3.1 INTRODUCTION**

This chapter examines the effectiveness of the laws providing for property rights in Uganda through looking at how these laws have been applied in matters concerning land, succession or inheritance and divorce.

A historical account of these laws is also considered. An attempt is made to analyze the blazes within the said areas of the law and to consider the manner in which they discriminate against women. Further the chapter addresses the effect of customary practices on the ability of women to own property and whether such practices possess the status of the law.

In conclusion of the chapter, the issue of whether the current provisions of the law deny women ownership rights will be resolved.

#### **3.2 INHERITANCE OR SUCCESSION LAW**

The basic law of inheritance is governed by the Succession Act Chapter 162 and the Administrator General Act Cap 157. Through customary law remains strong since Amendment to the Act. Before these laws were enacted it is important to note that matters relating to inheritance and succession were governed by customary practices.

According to the Law of Succession Act Cap 162, Section 50, both men and women are entitled to make wills and distribute their property as they wish. This testamentary freedom however enhances customary laws and practices which make it difficult for women to inherit property. Because a man who has been brought up in the belief to leave it to his wife or daughter and because the Ugandan law, recognizes testamentary freedom, it may be impossible to challenge such a will. Further, where among persons who would

normally be entitled to it depending on who is alive at the time of the deceased's death.<sup>33</sup> In case the deceased was married and had children, the spouse is entitled to 15% of the deceased's estate. This 15% is even shared amongst the deceased's wives in cases of polygamy. Irrespective of how much each wife might have contributed to the man's estate. Such a position is very unfair to a wife who might have contributed greatly to such an estate. Wives in polygamous unions are thus at a great disadvantages, say there are 15 wives each one will get 1% share which is almost nothing at all from the husband's estate. Section 27 (a) (ii), Succession Act Cap 162

On the other hand, the husband is entitled to 15% of his wife's estate if she dies intestate. Section 27 (a) (ii), Succession Act Cap 162. Irrespective of how many wives he has, the law is discriminatory in this case since it recognizes only polygamy and not polyandry in matters relating to inheritance of estates of deceased women by men. This is very unfair to women because the law creates an attempt to make men own more property.

The law also requires that where a person dies intestate the surviving spouse has a right to occupy the residential holding.<sup>34</sup> The law, however, makes a distinction between the rights of widows and widowers. Where as a surviving husband is given a life interest in such property, a surviving wife's right of occupation ceases on her re-marriage. It is a right conditional on her not re-marrying. This is again a discriminatory tendency that is prohibited by the law and also contravenes the constitution of Uganda.

This differential treatment is also applicable to the rights of the daughters and sons of parents who die intestate. The rights of a daughter to occupation ceases on her marriage unlike those of a son.

It is also noted that the right to stay in the house is simply the right to occupy the house but not a right of ownership. The law states that such a property is held by a personal representative of the deceased upon trust for his legal heir subject to rights of occupation.

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<sup>33</sup> Section 27 of the Succession Act Cap 162

<sup>34</sup> Rule 8 (9) Schedule 2 of the Succession Act

The legal heir is therefore the person with title to the residential holding. Consequently, a surviving spouse cannot offer such property as security for a loan. The definition of the legal heir is given by the Act.<sup>35</sup> Further discriminatory against women.

A legal heir is the living relative nearest in degree to an intestate, but where there is equality between a male and a female, a male relative inherit property more easily than females. In my opinion it would be better if such persons were given a joint tenancy in such property instead of favoring one against the other.

Section 3 of the Succession Act also provides that no person shall by marriage; acquire any interest in the property of the person whom he or she marries. I have analyzed this provision to mean that marriage does not culminate into co-ownership of the party's property.

Although this may be fair in relation to property acquired by either party before marriage, injustices may arise in relation to property acquired during marriage. The majority of women in Uganda is not formally employed and thus has no access to money to buy their own property. Consequently, most of the property in the home is bought by the husband on the other hand it is not fair to say that such women do not contribute to the property and that belong to the husband subject to distribution among different parties on his death. It is true that no law in Uganda equates domestic work such as home management, food production, looking after children and other household chores economic values, but if the wife did not perform these duties, the husband would not be free to earn money for the purchase of his property the hardship of this provision concerning family property is even more apparent in rural areas where women generate income from agricultural produce and the men simply appropriate the money. In such circumstances, therefore women normally have no rights to ownership and may walk out empty handed from their husband's home at death simply because of what the law provides.<sup>36</sup>

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<sup>35</sup> Section 2 of the Succession Act

<sup>36</sup> Tibatemwa Lilian, Property Rights the gender Question in the East African Journal of Peace and Human Rights Vol 2 1995 Page 72.



We all know that canon laws are not applicable in our courts of Judicature but many situations have arisen as the effect of this canon law. For instance couples that opt for church marriage rely on religious teachings that on marriage, the property of each party becomes the joint property of the husband and the wife. The effect of this teaching is very common in rural Uganda and in many cases women have lost all their property to men in this way. There are also no provisions whatsoever in the succession Act dividing property of couples that was acquired before marriage and after marriage, all that is there is for such property to be divided and women receiving only 15% of such property in cases of intestacy.

The Administrator General's Act Chapter 157 tries to foster a few safeguards incorporated in the statutory laws as against the inimical customary practices which are very unfair to women in succession cases.<sup>37</sup> The law creates various offence intended to protect the beneficiaries of the estate among which is the widow section 11 of the Act creates an offence to intermeddle in the property of a deceased person without the authority of a court or of the Administrator General. However, it should be noted that the penalty such as a fine not exceeding 200 shillings or three months imprisonment is not realistic and fair especially to the widow whose property has been robbed off by her in-laws. On the other hand the law enforcement agents are reluctant to enforce these laws against the relative of a deceased, for instance *IN THE MATTER OF THE ESTATE OF SULAIMAN*.<sup>38</sup> The brother of the deceased had distributed the intestate's property without court authority, and converted the articles and stock of the deceased's business in Kampala. When the Administrator general requested the police to charge the said brother with intermeddling, the police were extremely reluctant to do so. The widow also had no support from the relatives who believed that their brother had the customary right to dispose of the property. Several other cases of this nature are seen yet the law enforcers just look on while injustices are being done to widows.

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<sup>37</sup> Okumu-Wengi Jennifer, *The Law of Succession in Uganda* page 47.

<sup>38</sup> Okumu-Wengi Jennifer, *The Law of Succession in Uganda* page 57

Section 5 of the Act provides that a widow appointed under a will can apply for letters of administration without the consent of the Administrator general. This provision is again very restrictive especially to those widows who are not appointed under the will.

Thus consent from the administrator general must be obtained by widows in case of intestacy. The high court however has made it amendatory requirement that consent from the administrator general must first be obtained before a person applies for letters of administration showing a double standard in the law because what is in practice differs from what is in the statute book. The question therefore is which way should one proceed?

This provision leads us to section 200 of the Succession Act that provides that a person with the largest share to the Estate may apply for letters of administration. In some cases though, courts have held that the widow should be entitled to letters of administration but this is where the deceased has left many children and the widow's 15% share is still the greatest portion of the estate.

However, another principle was well laid down in the case of *Nyendooha Vs Nyendooha Robert and Another*.<sup>39</sup> The court observed that in deciding who should administer an estate, the court takes into account the interest of a person who is truly entitled, with interest prevails over other interests as well as the beneficiaries. In case the widow has custody of minor children as was in this case, letters of administration would be granted to her.

This holding is prima-facie fair to widows but it is not expressly provided for, as stated above it can be noted that there are some conditions to be fulfilled before a widow can be granted letters of administration over her late husband's property. For instance she must be in custody of minor children.

Also, the process of applying for letters of administration is long and expensive for instance costs of hiring an advocate and it may be hard for widows to afford. Such that by

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<sup>39</sup> (1977) HCB 288

the time the letters of administration is obtained there is actually almost no estate to manage because part of it has been sold off to meet these costs.

As seen above, it is therefore prevalent that our inheritance or succession laws need reform.

### **3.2.1 Intestate succession**

Intestacy may be total or partial. Total intestacy occurs where a person makes no effective testamentary disposition of any of the property, which he is competent to dispose of by will. On the other hand, partial intestacy occurs where a testator leaves an instrument, which although partly effective, either altogether fails to dispose of some specific property of the testator, or fails to dispose of an interest arising from the will. It is important to keep in mind partial intestacy because generally it has been assumed by several authors, that intestacy only means total intestacy.

The law of testate succession in Uganda is characterized by dualism, therefore the law applicable will depend on whether the deceased was governed by customary law or not. All persons to whom customary law applies were exempted from Section 27 of the Succession Act.

It is not clear whether the exemption was the basis of the consideration that statutory rules of intestate succession were “impossible or inexpedient to apply” to the exempted class of people. The exemption given to Mohammedans was revoked by the same statutory instrument. This would imply that even for Mohammedans the court has to decide which law applies. The research by Bukenya I (1990) concluded that the Muslim community prefers customary law. However, the general performance of customary law over other forms of succession is also the conclusion reached by Tibaruha L (1989). Tibaruha’s finding was that majority of Ugandans; regardless of their education prefer their long established customs in cases of succession.

### **3.2.2 Testate succession**

In Uganda testate succession is largely governed by the Succession Act.<sup>40</sup> Under the said law a person is entitled to make a will and thereby distribute property as he/she wishes.

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<sup>40</sup> As amended by the Succession (amendment) Decree 1972

This testamentary freedom is only regulated in order to balance certain conflicting interests. This usually involves balancing the wishes of the testator (individual) and the well being of the family and society.<sup>41</sup> The requirement for testate succession is a valid will. But as stated in *Administrator General Vs Teddy Bukirwa and Esther Bukirwa (1992)* “the will has two basic meanings”. The first refers to the total declaration of what the maker (testator) wishes to happen at his/her demise. The second meaning refers to the document itself. Because a will also refers to the document itself, it follows that a will in the ordinary sense must be in writing, and be designed by the testator or someone in his presence and at his direction.

### 3.3 DIVORCE LAW

The law governing divorce in Uganda is the Divorce Act, and customary law is as per as customary marriage are concerned divorce results into dissolution of a marriages and then comes these question of what actually happens to the family property whether such property is divided between the parties equally or what portion of the property does the wife or husband take.

The Act however has no specific provisions concerning the marital property at dissolution of marriage except as provided by Section 15 and 26.

Section 15 of the Act provides that where a judicial separation has been decreed, the wife is to be treated as unmarried with respect to property which she may acquire or which may devolve upon her. She is therefore free to deal with that property as if she were unmarried. If she dies intestate and during the subsistence of the separation, her husband would not be entitled to any portion of that property where as the provision protects properly acquired by the wife it does not ensure that she is entitled to any part of the family property.

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<sup>41</sup> under Section 46B of the Succession Act, where a person dies testate but does not make reasonable provision for the maintenance of a dependant relative, the court may order that reasonable provision be made out of the deceased's estate for the maintenance of that relative.

Section 18 of the same Act purports to protect the wife's proprietary rights where a husband has acquired an interest by virtue of the marriage she may if deserted by him apply to court for an order to protect any property which she may have obtained or may obtain after the desertion. The order would protect her property against the husband and his creditors. Again the provision only protects property which the woman obtained after the desertion. This provision would be fairer to the woman if such husbands lose rights acquired by virtue of the marriage even in property which the wife acquired before the desertion, since the basis of the right has been put to an end by the husband.

It is therefore noted that the apparent protection given to such a wife is made more of a mockery when the section gives the husband the right to apply to court for a discharge of the order where the desertion has ceased.<sup>42</sup> Since the property belongs to the wife, it should be the wife to choose whether the order be varied or discharged. It is even possible for the husband to return to the wife for the purpose of using her property to settle his debt and then desert her again.

The law of divorce is not only inadequate in protecting the wife's property but is also discriminatory against women. Under section 26, where a woman's adultery has been the cause of the divorce or judicial separation and such wife is entitled to any property, the court may order the whole or part of the property to go to the husband or the children.

A man is not subjected to this punishment even when he is the guilty party. Such discriminatory tendencies though prohibited by the constitution of Uganda do exist in our status books and it is until such provisions are erased or modified that divorced woman will enjoy proprietary rights.

As already noted, the Divorce Act does not make provision for the division of property in divorce, courts often however divide such property between the parties. Wide discretionary powers are given to courts by section 17 of the married women's Property Act which empowers courts to settle questions of title or possession between a wife and a husband.

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<sup>42</sup> Per Okumu-Wengi, the Law of Succession in Uganda page 47

There are no specific rules as to how property should be divided laid down in this Act so consequently there is confusion and sometimes contradictory decisions as some cases reveal a marked differences of opinion amongst judges.<sup>43</sup>

Although in cases where each party made direct contribution to the buying of property, courts will generally order division of the sales of property in rations representing the contributions, the position on indirect contribution is however not certain. Therefore, division of property is still very difficult as far as divorce is concerned because the present laws cannot aid such.

Section 28 Divorce Act further gives the courts powers to vary-pre-nuptial and post-nuptial agreements provided for under section 27. Such agreements however are very rare in the Ugandan situation. Therefore such a provision may never be utilized at all because of cultural practices.

On the whole since the divorce laws makes no provision for the redistribution of family assets, the divorced woman who wishes to share the property that was acquired jointly during marriage has to labor and go to court. She also has the burden of proving her contributions to such property using documentary evidence of receipts to show her financial contribution or any other cogent evidence. Because of all these inconveniences divorcing women hesitate to make claims against property that is registered in their husband's names since they even rarely have evidence to prove their contributions anyway.

Meanwhile for the woman who cohabits with a man the situation is even worse, there is no presumption of marriage or marriage by repute in Uganda.

The Divorce Act makes no provision for powers that chose not to marry under the four recognized forms of marriage. Because of this there are no legal provisions to determine what will happen to the property they jointly acquired.

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<sup>43</sup> M V M High Court Divorces Cause No. 3 of 1998 unreported.

Cohabitation is very common and frequently includes young women and rich older men who are already married.<sup>44</sup> These young women who separate from such men will only have recourse to filing a civil action under the general law of contract to claim their shares in any property they may have acquired. Otherwise there is no redress for them and hence they end up losing claims to any kind of property they may have contributed to.

It's therefore important to note that although, the Constitution of Uganda and other laws accord women formal equality with men. Indeed there is nothing progressive in granting women equal rights to property with the men when one considers that the same constitution acclaims a traditional society. Not only does the fantastic concept of equal rights create a contradictory satiation but it also provides ready ammunition for the patriarchs to undermine women's struggle for the better life through denying them rights to property.

Like already seen above Uganda runs a dual system of laws characterizing customary legal system and the western legal system therefore creating contradictory system of laws as one researcher put it "it has confined the majority both male and female to an arbitrary world governed at one moment by universal laws which applied to all citizen at another moment by laws which apply solely to members of a given tribes, clan an ethnic group" this legal dualism has made it possible for patriarchal society to result claims for women rights by facilitating between the two system, successfully neutralizing any reforms that might have been instituted.

### **3.4 LAND LAW**

Land law in Uganda is governed by the Constitution of Uganda, the Land Act Chapter 227 (as amended), Common Law, and Doctrines of Equity per their reception date.<sup>45</sup>

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<sup>44</sup> Cited in Women and Land in Africa page 240

<sup>45</sup> 1902 East African Order in Council and customary practices

It is important to note that land is the most important asset through which most women derive their livelihood. Land law in this country has gone through an evolution which evolution has had effects in the women's rights to own land as property.

It is noted that the pre-1900 period, customary practices prevailed in Uganda with each ethnic group displaying it or roles concerning land.<sup>46</sup> An existence of dichotomy in customary property laws in this case was also evident. Individual ownership was limited to what an individual had acquired and improved on the land while the community owned land or property in its natural state, this practice was common in the kingdom areas of Ankole, Buganda, Tooro and Bunyoro. Men in this area displayed a patrilineal customary practice in regards to land, they had absolute inheritance rights to occupation, possession and the products on the land occupied or cultivated and the right of privacy in their homes, these rights however did not apply to women though the women had the right to use land through marriage.<sup>47</sup>

In the colonial era and the post independence, thus 1900 and 1970, new shifts from the customary rules governing land and statutory laws concerning land were put into place. These laws included the 1908 Buganda Land Law, 1927 Busuulu and Envujjo Laws, the Crown Land ordinance, the 1962 Public Land ordinance, the 1962 Public Land Act, 1975 Land Reforms Decree, the Land acquisition Act, Land Transfer Act among others. All these Acts were enacted to protect land especially family land and ownership of land of both men and women as protected by section 27 and 39 (1) of the Land Act Cap 227.

During this period, all the laws enacted in one way or another encouraged individual ownership of land without any discrimination to sex but the only setback was the fact that customary practices still dominate land matters especially land that was owned and managed by Africans.

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<sup>46</sup> Muthoni Wanyeki, *Women and Land in Africa* page 233.

<sup>47</sup> Bikaako Winnie and Ssenkumba John *Gender and Land Rights* page 234



From 1975 to date various laws mentioned above were repeated and other amended but their effects of such laws are still felt to date. The British colonial system left intact the patriarchal customs and traditions adhered to by various ethnic groups in Uganda, whereby family heads predominantly assumed greater autonomy in decisions regarding land access, use and control the rendering women's uses rights which was altered by colonial legislation less permanent than before. In essence, the colonial land laws and policies further strengthened the patriarchal gender relations that existed in Uganda.

To date, Uganda like most post colonial African states is characterized by legal dualism in the existence of an imported western legal system and existence of an imported western legal system and customary legal systems specifically pertaining land and property rights, marriage and succession among other.

Land at common laws is presumed to belong to the person in whose name it is held, in most cases the husband, through this presumption can be rebutted if the wife adduces evidence to the contrary. The customary practices and tendencies in Uganda normally accord men's rights to own land exclusive of women. Women in this respect are only given use rights on men's land. This customary practice is even made worse by the English law concept that whatever is attached to the land belongs to the land.<sup>48</sup> Since the land belongs to the man, the development there on also pass on to him. For instance where a building is erected on the land, the building becomes part of the land and the man becomes its owner even if the materials used in its construction are bought by the wife. It noted that though the wife may have contributed towards the development of such property such efforts do not give these women any interests in such land.

The above position of the law is being practiced so many at times in Uganda today to the extent that women who contribute towards the development of their matrimonial homes always get out of such homes empty handed without being considered that they had at one time contributed towards the development of such property either directly or

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<sup>48</sup> The concept is expressed by latin maxim *Quic quid plantar solo solo cedit*

indirectly. In the case of *EDITA NAKIYINGI V MEREKIZEDEKI*<sup>49</sup> shows a relaxation of the position above the doctrine of equity. The parties in this case had been married for twelve years during which time the wife tilled the husband's land. A house was also elected on the land and the wife contributed some iron sheets towards its construction. The husband terminated the marriage and ordered the wife to leave the house. The Court of Appeal held that although in law expending money on another's property does not give one any interest in such property, the doctrine of equitable estoppels may apply if a wife has incurred expenditure on the property and belief and encouraged by her husband that she was or will be given some proprietary interest in it. That in such circumstances in the event of sale, the wife was to get half of the market price. It was further held that it's not necessary to establish any express or implied agreement that the wife made any contribution to the family property with a view of acquiring an interest.

The husband had in his evidence conceded that the wife have indeed tilled the land and contributed to the house but that she had done so as a wife and not for the purpose of acquiring a beneficial interest in the property.

In this case, it is seen that courts applied the doctrines of equity to ensure that the wife the wife doesn't lose what she invested in the husband's home. It is also seen that courts may have gone a long way in protecting the wife's interest but this could have resulted from a "substantial contribution". Courts demand a substantial contribution before applying the equitable principle. However, this substantial contribution has not yet been defined by the courts. Since the courts have not defined substantial contribution made by women towards their marital property it has become harder for men to claim interest on such property because they do not know what substantial contribution amounts to or even prove such contribution.

According to the current legal regime the only rights that women have to marital property especially land, is section 39 of the Land Act (as amended).<sup>50</sup> This provision restricts a

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<sup>49</sup> 1973 HCB 23

<sup>50</sup> 20<sup>th</sup> March 2004

person from selling, transferring, exchanging, pledging, mortgaging, leasing or giving away any land on which she or he resides on with his or spouse or children and from which they derive their sustenance without the consent of each spouse.

This provision though on the surface of it appears to accord women protection. It does not protect a married woman from losing her home if the land is being sold by a mortgagee whose rights derive through the exercise of powers under the mortgage.

Further, the rights of a woman under this section may cease on separation with her husband because she can not prove that she derives sustenance from such home or land. It is thus clear from the analysis of the section that the section sets up conditions to be relied on by the spouse when exercising her rights to the consent for instance proof that she derives her sustenance from such land thus it is very true to state such a provision may not be very helpful to those couples with more than one piece of land because proof of deriving sustenance from such land may be hard.

It is important to state that the laws in Uganda do not prevent women from acquiring and owning land. Women can be given land by their fathers or husbands or can purchase such land by themselves.

The traditional socio-cultural values and the level of development of most of our communities however, together with the laws like Land Act and the Constitution that have acknowledged the existence of a customary land tenure system make women's acquisition of landed property very difficult.

Thus outright gift of land by the male family heads to their wives or daughters are very rare to come by just as situations of land inheritance by the female gender.<sup>51</sup>

It is also noted that in many Ugandan societies, a woman ceases to be a member of her father's family when she marries and does not hope to inherit any of the property in her father's home. She therefore expends all her energy in developing her new home, her

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<sup>51</sup> Kigula John, Women in Land Disputes in Uganda page 1

husband's land and yet in this case she is presumed to be doing all these by her status of a wife and a mother to her husband's children and therefore not as a means of gaining proprietary interest in such property. The law in this case does not presume the principles of survivorship or a joint tenancy hence leaving the woman without any grounds to lean on in order to acquire such land.

It is thus very clear that if the women are to acquire more rights to land a reform needs to take place in the customary practices relating to land and some provisions of the land law.

## **CHAPTER FOUR**

### **4. GAPS, LOOPHOLES AND OVERLAPS**

#### **4.1 INTRODUCTION**

This chapter states the gaps, loopholes and overlaps within the provisions of the law relating to women's property right in Uganda. The chapter will make mention of recommendations within the mentioned areas of the law calling for reform and then make a general conclusion on the analysis of the laws providing for women's property rights.

#### **4.2 LOOPHOLES IN THE LAW**

The legal regime concerning women's property rights in Uganda is currently faced with one major obstacle that is customary practice emanating from the various ethnic groups in Uganda.

These customs and practices generally discriminate against women and in particular deny them rights to own or inherit property it is thus noted that these customs and practices that deny women rights to property favor as against women.

The constitution of Uganda lacks a provision concerning the distribution of property hence with this gap within the supreme law of the land, the other legislation such as the Divorce Act, Marriage Act similarly do not provide for the same.

There is also a need for a definition of what constitutes the estate of the deceased and family property since the current definitions are not satisfactory enough.

The following provisions of the law and regulations constitute discrimination against women as far as property rights are concerned. These include;

- a) Section 2 of the Succession Act which gives preference to male relatives in case of inheritance.
- b) Rule 8 of the Schedule 2 to the Succession Act which gives different right of occurrence to widows and widowers.

- c) Section 26 of the Divorce Act which provides for the punishment of an adulterous wife but not adulterous husband.

Section 27 of the Succession Act gives a husband 15% of the wife's estate in case of either polygamy or monogamy as against the wives in case of polygamy who may have to share the 15% amongst themselves.

Further the following provisions of the law do not expressly provide for protection of spouse's or wife's rights to property. Section 39 of the Land Act as amended in 2003, further gives an aggrieved spouse a right of appeal where consent has been denied.

The section further erodes the right of a spouse to stay on her land in case of a mortgage deed thus land or home be sold away by a mortgagee. Further the section ceases to apply to a spouse if she does not derive her sustenance from such land.

Under the Administrator General's Act, the penalty under section 11 is not enough given to current economic status of Uganda, two hundred shillings as a fine to whoever intermeddles with the deceased's property this is very unrealistic.

Further section 200 of the Succession Act does not take into consideration the rights of as a widow to her husband's estate in case of polygamous marriages when applying for letters of administration. The section provides that a person with the largest share of the estate may apply for letters of administration. Therefore, where there are many women, they will not apply for letters of administration because the percentage they hold is much less than for the other beneficiaries.

Section 18 of the Divorce Act gives the husband the right to apply to court for a discharge of the order where desertion has ceased, this creates an unfair situation to wives whose husband may terminate the desertion for purposes of acquiring the matrimonial property and later desert them again leaving them with almost nothing to own.

The Married Women's Property Act 17 does not give any specific rules on how property should be divided. This creates contradictory precedents in our courts of law thus at one time property may be divided equally and at another only a part of it may be given to the woman.

Courts further do not define what substantial contribution is, when demanding that the woman must have made a substantial contribution towards the husband's property before such property is divided equally between them on divorce. Such position of the courts has made it harder for women to prove their substantial contributions towards the husband's property.

Coupled with the above gaps in the law, it is also important to note that the majority of women in Uganda are illiterate therefore do not know about their rights to own property provided by the constitution of Uganda therefore, they are left at the mercy of men.

Further, for those women who know the law, enforcement of such may be hard for them because of their financial status. Most of the women are not formally employed hence may not be in position to access courts of law because of the expenses incurred in the process of legal redress. It's therefore noted that denial of women property rights is both a socio-economic and legal matter.

For the purposes of this law, contribution shall include monetary and non-monetary contributions, for example, labor or upkeep of the family where a spouse makes a contribution towards the improvement of the other spouses. Property acquired prior to or during the marriage, which property does not constitute matrimonial property, the spouse without the title shall acquire a beneficial interest equivalent to the contribution made but due to customary law the property normally goes to the husband.

The parties may, by ante-nuptial or post-nuptial agreement vary the terms of their property rights in marriage except in relation to the matrimonial home such agreements must not be a result of force fraud or undue influence.

But this never happens because the law is silent on the procedure to be followed and mostly it is granted by discretion of court.

In the event of separation or divorce, each spouse should be entitled to part of the matrimonial property, which should be divided as set out in chapter six on break-down of marriage.

This means that marital property should be divided equally unless these are compelling reasons for not doing so. These include;

- a) The spouse with custody should get a bigger share
- b) The English criteria of the one-third principle, where one third is regarded as a starting point and can be adjusted upwards or downwards or dispensed with depending on the circumstances, should be adopted.
- c) Financial status of the parties should be taken into consideration when dividing the property.
- d) Both monetary and non-monetary contribution towards the acquisition or improvement of the property should be considered.
- e) Property acquired by way of inheritance should be separate property to whom it was bequeathed. This gives men opportunity to exploit women.



## CHAPTER FIVE

### 5. RECOMMENDATIONS AND CONCLUSIONS

#### 5.1 Recommendations

Problems women face in acquiring property are basically socio-economic in nature as well as legal. It is noted that the majority of women are illiterate and therefore not formally employed hence are not in position to be financially capable of acquiring property on their own.

It's therefore submitted that;

Laws and regulations that constitute discrimination against women should be abolished.

These include;

- a) Section 2 of the Succession Act which gives preference to male relations incase of relations incase of inheritance.
- b) Rule 9 of Schedule 2 of the Succession Act which gives different rights of occupancy to widows and widowers.
- c) Section 26 of the Divorce Act which provides for the punishment of an adulterous wife but not an adulterous husband. This section should therefore be reviewed for without formal equality, women stand condemned by the law.
- d) Section 27 of the Succession Act that gives a wife or wives 15% out of the estate of an intestacy even in polygamous marriage and later gives 15% to a man whose wife dies intestate to own inherit such property should be abolished or reviewed in such a way to provide for equality between the two sexes regarding property of a deceased intestate. Further, customs that deny women rights to own and inherit property should also be abolished.

Some provisions of the law should be reviewed and made to suit the times of the current age for instance section 11 of Administrator's General Act that gives a fine of two hundred shillings to whoever intermeddles with the deceased's property.

Section 39 of the Land Act should be reviewed in a way that it accords protection to the spouse to live on such land without any right to appeal when her consent has been denied to her husband.

Further, section 200 of the Succession Act should specifically state who should apply for the letters of administration of a deceased's estate, this will help to prevent the strife between the widow and her in-laws as to who should administer of her deceased husband. Further the requirements for seeking consent from the administrator general by whoever is applying for letters of administration should be clearly provided for this will avoid double standards in the law. For instance this requirement was waived by the Administrator General's Act in case the widow is the one applying for letters of administration, yet the High Court of Uganda has made it mandatory requirement for whoever is applying for letters of administration to obtain consent from the administrator general.

When faced with a question of division of property, courts should define what "substantial contribution" of a woman for her marital property constitutes. This will help women to claim and prove their claims in the property that they have worked for.

Further, laws like the Marriage Act, Divorce Act among others should specifically provide for division of property in cases of marriage and at its dissolution, this will help to prevent unjust claims by either party to marriage contract.

## **5.2 Conclusion**

Although the 1995 Constitution of the Republic of Uganda and other International Conventions to which Uganda ratified give protection to women among other persons against abuse of their rights enforcement of those statutory provisions is difficult as they conflict on specific provisions towards women. Therefore women should be sensitized about their legal rights and obligations to enable them see legal redress where they have been denied their rights to own property.

All the same because of this illiteracy, they are not aware of the provisions the law providing for their rights to property. On the other hand, discrimination against women has its roots in culture and tradition. Therefore, unless there is change in the attitudes of men and women with regard to each other's rights, there is no legislation that can achieve genuine gender equality. It should be noted that changing beliefs in stereotyped roles for men and women is thus a precondition for ensuring equal opportunities for education between boys and girls in the absence of free education.

Further, the concept of equality can not be effective because of the higher illiteracy levels amongst women and their low economic status which do not allow them even take advantage of the positive elements of the law. Yet the law enforcers can not even consider the status of those women when they seek redress in courts of law and as a result they are being denied rights to own property simply because they can not afford to pay for the expenses incurred in the court of law.

However, though the problems that women face stem from socio-economic aspects, there is still a need to amend law and legislations which discriminate against women to ensure formal equity between men and women. Because when the law makes provision for formal equity in all aspects, women will secure a legal platform from which to challenge customs, tradition and practices that discriminate against them.

Above all, the need for education of the girl child should also be emphasized among the illiterate groups of women so that they are able to know and understand the values of formal education and take their children to school in particular the girls. This will help to reduce on the high level of illiteracy among women and instead increase the legal awareness amongst women at large concerning their rights and the struggle for better life in the society.

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